

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
December 18, 2007 Session

STATE OF TENNESSEE v. ANTHONY SCOTT LEDFORD

Direct Appeal from the Criminal Court for Campbell County
No. 12968 Shane Sexton, Judge

No. E2007-00780-CCA-R3-CD - Filed October 23, 2008

Following a jury trial, Defendant, Anthony Scott Ledford, was convicted of driving under the influence (DUI) and possession of drug paraphernalia, both Class A misdemeanors. The trial court found Defendant guilty of violation of the implied consent law and revoked his driver's license for one year. The trial court sentenced Defendant to concurrent sentences of eleven months, twenty-nine days for each conviction. Defendant was ordered to serve two days in jail with the balance of the sentence suspended and Defendant placed on probation. On appeal, Defendant argues that the evidence was insufficient to support his conviction of DUI, and that the trial court erred in denying his motion for a mistrial based on the prosecutor's remarks during closing argument. After a thorough review, we affirm the judgments of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Criminal Court Affirmed

THOMAS T. WOODALL, J., delivered the opinion of the court, in which JOHN EVERETT WILLIAMS, and J. C. MCLIN, JJ., joined.

Michael G. Hatmaker, Jacksboro, Tennessee, for the appellant, Anthony Scott Ledford.

Robert E. Cooper, Jr., Attorney General and Reporter; Renee W. Turner, Assistant Attorney General; William Paul Phillips, District Attorney General; and Tracy Jenkins, Assistant District Attorney General, for the appellee, the State of Tennessee.

OPINION

I. Background

Deputy Darrell Mongar and Deputy Rusty Orick, K-9 officers with the Campbell County Sheriff's Department, initiated a traffic stop of an unrelated vehicle on I-75 on September 30, 2005. Deputy Mongar testified that Defendant passed the parked vehicles in a tractor trailer. Deputy Mongar and Auxiliary Deputy Orick drove away from the traffic stop and followed Defendant for approximately a mile and one-half to two miles. Deputy Mongar stated that Defendant's vehicle

crossed the centerline three times. At one point, Defendant's tractor trailer crossed the right fog lane, and the truck's trailer straddled the dividing line between the two lanes so that no one could pass.

Deputy Mongar activated his blue lights. When Defendant did not immediately respond, Deputy Mongar activated his siren and blew his horn. Defendant then pulled over to the side of the interstate. Deputy Mongar approached the truck's cab and asked Defendant to step to the rear of the trailer with his log books. Deputy Mongar said that Defendant's eyes were "glassy" and his pupils were dilated. Deputy Mongar described Defendant as "jumpy." Deputy Mongar said that he administered two field sobriety tests to Defendant. In the "one-legged stand" test, Defendant put his foot down on the ground for counts eighteen, nineteen, and twenty, and then raised his foot again until the end of the test at count thirty. Defendant performed the "heel-to-toe" test, but he raised his arms to maintain balance during the performance of the test. Defendant told Deputy Mongar that he did not have any alcohol or narcotics in his tractor trailer and consented to a search of his vehicle.

During the search, Deputy Mongar found a glass pipe in a cubbyhole behind the driver's seat. Based on his experience in investigating drug offenses, Deputy Mongar stated that similar pipes were used by people to inhale a narcotic. Defendant told Deputy Mongar that he had used methamphetamine in the past. Deputy Mongar stated that he observed a residue in the pipe and took a sample of the residue with a sterile swab. Deputy Mongar testified that he "sent [the swab] to be tested to see what the substance was that was inside the pipe." The sterile swab was introduced as an exhibit at trial without objection.

Deputy Mongar placed Defendant under arrest for DUI and read him the implied consent form. Defendant signed the form but refused to submit to a blood test. Defendant told Deputy Mongar that he understood the contents of the implied consent form. Deputy Mongar stated that based on his experience, Defendant appeared to be under the influence of a narcotic rather than alcohol.

On cross-examination, Deputy Mongar stated that his records reflected that he pulled Defendant over at 10:37 p.m. Deputy Mongar acknowledged that Defendant said that he had been driving for a long time that day. Deputy Mongar said that Defendant walked in a straight line when he performed the "heel-to-toe" test, and put his foot down only once during the "one-legged stand" test. Deputy Mongar acknowledged that the glass pipe was wrapped in a napkin and was cool to the touch.

Deputy Orick testified that Defendant's tractor trailer was weaving across the lanes while he and Deputy Mongar followed him. Deputy Orick could not recollect how many times Defendant's vehicle crossed a lane divider, but he stated that they initiated the stop when Defendant's driving became a danger to others. Deputy Orick remained standing in front of the patrol car while Deputy Mongar talked to Defendant. Deputy Orick described Defendant as "kind of belligerent," but stated that Defendant was not "combative." Deputy Orick said that Defendant was "real jittery," and his eyes twitched. Based on his observations, Deputy Orick believed that Defendant was under the influence of a narcotic.

The State rested its case-in-chief, and Defendant testified on his own behalf. Defendant testified that he had been a truck driver for approximately fourteen years and was employed by U.S. Express at the time of the incident. Defendant said that he got up at 5:30 a.m. on September 30, 2007, in Livonia, Michigan. He left at approximately 7:45 a.m., headed for Cartersville, Georgia. Defendant said that he was allowed to drive a total of eleven hours each day so long as the eleven hours occurred within a fourteen-hour time period. Defendant stated that he was required to keep a daily log which recorded the periods during which he was not driving. On September 30, 2007, he stopped in Walton, Kentucky at 12:45 p.m., and resumed driving at 4:00 p.m. He continued to drive until he was pulled over in Tennessee at 9:15 p.m., (or 10:15 p.m., eastern standard time).

Defendant denied that he had been drinking that day or that he had taken any medication or narcotics. Defendant said that the glass pipe did not belong to him. Defendant acknowledged that he drove erratically before he was stopped. Defendant said that he regularly talked to family members on his cell phone while he drove. Defendant stated that he dropped his cell phone while he was talking to his daughter just before the traffic stop. When he reached down to retrieve it, he “was all over the road.” Defendant stated that he had planned to stop for the night at the 141 exit off I-75 before he was stopped.

On cross-examination, Defendant said that Deputy Mongar did not show him the glass pipe during the traffic stop, and Defendant denied that he told Deputy Mongar that he had smoked methamphetamine in the past. Defendant said that he did not see any other cars on the road other than the patrol car after he retrieved his cell phone. Defendant acknowledged that he crossed the fog line approximately three times and straddled the middle lane divider, but he said that he did not believe that he drove erratically for as far as one-half mile. Defendant again disavowed any knowledge of the glass pipe. Defendant acknowledged that he refused to take a blood test and that Deputy Mongar read him the contents of the implied consent form. Defendant said, however, that he was very tired and did not understand that he could lose his license if he did not agree to submit to the blood test. Defendant said that the truck he was driving on the night of the incident was the truck he usually drove for the company.

Christine Ledford, Defendant’s wife, testified that she talked to Defendant several times by cell phone on September 30, 2007. Ms. Ledford called Defendant around 8:45 p.m. [central standard time] so Defendant could tell his son goodnight. Ms. Ledford said that Defendant did not appear to be under the influence of any substance at that time, but he sounded tired. Ms. Ledford said that Defendant called her collect from the Campbell County jail at approximately 10:30 p.m. and told her he had been arrested. Ms. Ledford drove to the jail from Old Fort and arrived at approximately 12:55 a.m.

On cross-examination, Ms. Ledford acknowledged that at the time of his arrest, she had not seen Defendant in approximately two days.

II. Sufficiency of the Evidence

On appeal, Defendant does not challenge his conviction of possession of drug paraphernalia. Defendant also acknowledges that he was driving a motor vehicle on a public road. Defendant argues, however, that the evidence does not support a finding that he was under the influence of a narcotic at the time the traffic stop was initiated. Defendant submits that his sleepiness after driving nearly eleven hours that day accounted for his “glassy eyes and dilated pupils.” Defendant also points out that he completed the field sobriety tests for the most part which supports a finding that he was not under the influence of any drug.

In reviewing Defendant's challenge to the sufficiency of the convicting evidence, we must review the evidence in a light most favorable to the prosecution in determining whether a rational trier of fact could have found all the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789, 61 L. Ed. 2d 560, 573 (1979). Once a jury finds a defendant guilty, his or her presumption of innocence is removed and replaced on appeal with a presumption of guilt. *State v. Black*, 815 S.W.2d 166, 175 (Tenn. 1991). The defendant has the burden of overcoming this presumption, and the State is entitled to the strongest legitimate view of the evidence along with all reasonable inferences which may be drawn from that evidence. *Id.*; *State v. Tuggle*, 639 S.W.2d 913, 914 (Tenn. 1982). The jury is presumed to have resolved all conflicts and drawn any reasonable inferences in favor of the State. *State v. Sheffield*, 676 S.W.2d 542, 547 (Tenn. 1984). Questions concerning the credibility of witnesses, the weight and value to be given the evidence, and all factual issues raised by the evidence are resolved by the trier of fact and not this court. *State v. Bland*, 958 S.W.2d 651, 659 (Tenn. 1997). These rules are applicable to findings of guilt predicated upon direct evidence, circumstantial evidence, or a combination of both direct and circumstantial evidence. *State v. Matthews*, 805 S.W.2d 776, 779 (Tenn. Crim. App. 1990).

A person commits DUI who drives or is in “physical control of any automobile or other motor driven vehicle on any of the public roads and highways ... or while on ... any ... premises which is generally frequented by the public at large” while under the influence of “any intoxicant, marijuana, narcotic drug, or drug producing stimulating effects on the central nervous system.” T.C.A. § 55-10-401(a) (1).

Defendant’s challenge to the sufficiency of the evidence essentially challenges the credibility of the witnesses. The jury by its verdict obviously accredited the testimony of Deputy Mongar and Deputy Orick, and found Defendant’s explanation for his erratic driving and physical appearance not credible. Deputy Mongar testified that Defendant’s “eyes were glassy and his pupils were dilated.” Deputy Orick also noticed that Defendant’s eyes were “twitching,” and both described Defendant as “jittery.” Deputy Orick testified that Defendant could not stand up straight, and Defendant exhibited some difficulty with balance during the field sobriety tests. Deputy Mongar testified that based on his experience, Defendant was under the influence of a narcotic at the time of the traffic stop.

This Court has often found that an arresting officer's testimony alone is sufficient to support a defendant's conviction for DUI. *See, e.g. State v. Vassar*, 870 S.W.2d 543, 544 (Tenn. Crim. App. 1993). Based on our review of the record, we conclude that the evidence was sufficient to support Defendant's conviction of driving under the influence. Defendant is not entitled to relief on this issue.

III. Motion for Mistrial

Defendant argues that the trial court erred in not granting his motion for a mistrial based on the prosecutor's comments during rebuttal argument. Specifically, Defendant contends that the State improperly commented on the existence of a witness who did not testify at trial for the State, and that the comments were so unfairly prejudicial as to warrant a new trial.

At trial, the State elicited the following testimony from Deputy Mongar without objection by Defendant:

STATE: Did you ask the defendant about [the glass pipe] when you found it?

DEPUTY MONGAR: Yes.

STATE: What did he say?

DEPUTY MONGAR: He stated that he had used Meth in the past.

STATE: Did you have the opportunity to notice whether there was anything in that pipe?

DEPUTY MONGAR: Yes, there was a residue inside the end of that pipe.

STATE: Okay. What did you do with that residue?

DEPUTY MONGAR: I got a sterile swab that the Meth Task Force issues us. I got a sterile swab, swabbed the inside of the pipe, sealed the swab up in an envelope and sent it to be tested to see what the substance was that was inside the pipe.

The State then introduced the swab into evidence as an exhibit at trial without objection.

During closing argument, defense counsel stated:

[w]ell, let's talk about them, Exhibits 1 and 2. They want to call it a crack pipe, they want to do whatever, they want to do this, they want to do that. I don't know what it is, but let me tell you, you can rest assured, just as sure as you are sitting right there in that chair, they took a swab out of this pipe and they sent that swab to a laboratory. That's the testimony. You can bet your bottom dollar. You can bet everything that you have. You can do whatever. If there had been any illegal substance in that pipe . . .

The State objected, and a conference was held out of the hearing of the jury which was not transcribed for the record. At the conclusion of the conference, the trial court instructed the jury:

Ladies and Gentlemen, please recall the instruction that I have given you previously. Arguments that are made by counsel for either side is not evidence. You are – instructed to make your decision based on the evidence and the arguments for the purpose of explaining that evidence. If any – any evidence is inconsistent with an argument that is made, as long as the argument is not improper, you are to disregard that part of the argument. If it is improper then I will instruct you accordingly. Do you understand that? All right.

Defense counsel continued with his closing argument:

DEFENSE COUNSEL: They took a swab from this pipe, and you can rest assured that if there had been an illegal substance on that swab coming from that pipe, somebody would have told about it from right there, and they didn't. Now, you heard the testimony. He said, "I took the swab. I sent the swab – the substance to the lab." That's what he said. If there had been an illegal substance on it, you would have heard somebody say it, and you didn't.

THE COURT: Rebuttal argument.

STATE: Ladies and Gentlemen, we had a witness here to testify today, but we didn't get to get him to testify . . .

THE COURT: All right. All right.

DEFENSE COUNSEL: I object to that.

THE COURT: Hold it. Take the Jury out. Take the Jury out.

During a conference out of the jury's presence, the trial court found that defense counsel's argument, "as inflammatory as it might have been," was based on the evidence in the record and therefore proper. Defense counsel moved for a mistrial which was denied by the trial court. The trial court offered to provide a curative instruction to the jury but recognized that any instruction might call undue attention to the matter. Defense counsel informed the trial court that he did not want a curative instruction at which point the trial court expressed its agreement, noting that "the best thing to do is to let it lay."

Our supreme court has recognized that closing argument is a valuable privilege for both the State and the defense, and that counsel is afforded wide latitude in presenting final argument to the jury. *See State v. Cribbs*, 967 S.W.2d 773, 783 (Tenn. 1998). However, a party's closing argument "must be temperate, predicated on evidence introduced during the trial of a case, and must be pertinent to the issues being tried." *State v. Middlebrooks*, 995 S.W.2d 550, 568 (Tenn.1999). A party "must be given the opportunity to argue not only the facts in the record but any reasonable inferences therefrom." *Id.* (citing *Russell v. State*, 532 S.W.2d 268, 271 (Tenn. 1976)).

Additionally, we have recognized five general areas of prosecutorial misconduct: (1) intentionally misstating the evidence or misleading of the jury on the inferences it can draw; (2) expressing personal beliefs or opinions; (3) inflaming or attempting to inflame the passions or prejudices of the jury; (4) adding outside issues to the guilt or innocence issue; and (5) arguing or referring to outside facts. *State v. Goltz*, 111 S.W.3d 1, 5-6 (Tenn. Crim. App. 2003).

When a prosecutor's argument goes beyond the latitude afforded, the test for determining if reversal is required is whether the impropriety "affected the verdict to the prejudice of the defendant." *Harrington v. State*, 215 Tenn. 338, 340, 385 S.W.2d 758, 759 (1965); *see also Middlebrooks*, 995 S.W.2d at 559. Factors relevant to that determination include: (1) the disputed conduct viewed in light of the circumstances and facts in the case; (2) any curative measures taken by the trial court and the prosecution; (3) the prosecutor's intent in making the improper statements; (4) the cumulative effect of the prosecutor's statements and other errors in the record; and (5) the relative strength and weakness of the case. *Middlebrooks*, 995 S.W.2d at 559 (citing *State v. Bigbee*, 885 S.W.2d 797, 809 (Tenn. 1994)).

When considering whether a mistrial should have been granted, this court is bound by the principle that the decision of whether to grant a mistrial is within the sound discretion of the trial court, and the trial court's ruling will not be disturbed absent a finding of an abuse of discretion. *State v. Land*, 34 S.W.3d 516, 527 (Tenn. Crim. App. 2000) (citations omitted).

The State argues initially that Defendant has waived this issue on appeal because he failed to request a curative instruction. *State v. Thomas*, 158 S.W.3d 361, 413 (Tenn. 2005). However, a review of the record indicates that a curative instruction had just been given to the jury. The option of a curative instruction was discussed, and defense counsel, with the agreement of the trial court, decided to forego such option. At the hearing on Defendant's motion for new trial, the trial court reiterated that it found "no fault" in defense counsel's not requesting a curative instruction at that

point in time and recognized the reasoning behind foregoing the instruction. Under the circumstances presented in this case, we conclude that Defendant has not waived this argument. *See State v. Ward*, 138 S.W.3d 245, 277 (Tenn. Crim. App. 2003).

Although the State acquiesced at the trial level that the prosecutor's remark was improper, the State argues on appeal that its comments were not improper because they were clearly in response to Defendant's closing argument. The State also suggests that the trial court erred when it sustained Defendant's objection to the prosecutor's remark. Essentially, the State contends that Defendant knew why there was no expert testimony concerning the substance found in the glass pipe, and that Defendant improperly implied that if the substance had proven to be a narcotic, then the State would have produced a witness at trial to testify to the test results.

As way of background, according to the transcript of the preliminary hearing which was attached as an exhibit to the State's response to Defendant's motion for new trial, Deputy Mongar testified in response to questioning by defense counsel as follows:

DEFENSE COUNSEL: have you gotten any kind of a lab report on the glass pipe?

DEPUTY MONGAR: We [did] a swab . . . for the meth task force, we have these swabs that we can swab basically anything. We send them down to the meth task force. They run them through an ion scanner and the results come back positive for methamphetamine inside the glass pipe.

DEFENSE COUNSEL: Do you have that lab report?

DEPUTY MONGAR: Yes, I do.

According to the transcript of the hearing on Defendant's motion for new trial, Defendant at some point orally requested the trial court to exclude the State's expert witness from testifying at trial. The trial court granted Defendant's request because the State failed to give notice to Defendant that they intended to call the expert witness. This discussion was not transcribed.

Certainly, lawyers on either side "are prohibited from arguing facts which are outside the record." *State v. Bowers*, 77 S.W.3d 776, 787 (Tenn. 2005). The trial court found that defense counsel's closing argument was predicated on the evidence introduced at trial, that is, the swab which Deputy Mongar testified had been sent to the Methamphetamine Task Force for testing. We agree that defense counsel's closing argument was not improper to the extent that the argument summarized Deputy Mongar's testimony at trial concerning the procuring of a residue sample from the glass pipe. However, neither the State nor defense counsel should make arguments regarding the absence of evidence excluded by the trial court. *State v. Jordan*, 116 S.W.3d 8, 19-20 (Tenn.

Crim. App. 2003). What was improper, therefore, was defense counsel’s suggestion to the jury that it could infer that the test results for methamphetamine were negative because the State did not offer the test results into evidence, especially in view of Defendant’s request to exclude the expert witness’ testimony, and the preliminary hearing testimony. *See Jordan*, 116 S.W.3d at 19 (concluding that defense counsel’s argument that “it would be nice to have some doctor’s testimony” about the “psychological scars” of a minor sexual abuse victim was improper when it is clear “that the prosecution is not permitted under our law to present to a jury expert proof of the symptoms of child sexual abuse in order to prove that such abuse occurred”).

It is clear that the State’s improper comments about the excluded expert witness during rebuttal argument were invited by or a response to defense counsel’s contention that the jury could draw an inference favorable to Defendant that the missing test results were negative. Nonetheless, any impropriety on the part of defense counsel during opening or closing argument does not transform an improper response from the prosecutor into a proper one. *See U.S. v. Young*, 470 U.S. 1, 11, 105 S. Ct. 1038, 1044, 84 L. Ed. 2d 1 (1985) (observing that “[c]learly two improper arguments – two apparent wrongs – do not make for a right result”). However, as our supreme court has observed, although an “invited response” does not excuse improper comments, we must determine the effect of the comments on the trial as a whole. *State v. Thomas*, 158 S.W.3d at 414 (quoting *Darden v. Wainwright*, 477 U. S. 168, 182, 106 S. Ct. 2464, 2472, 91 L. Ed. 2d 144 (1986)); *Jordan*, 116 S.W.3d at 20.

The trial court quickly interceded when the prosecutor began her closing argument, and the prosecutor’s comments, while meaningful to those with knowledge of their background, were not so egregious or specific as to render the trial fundamentally unfair. The trial court had just reiterated its instruction to the jury that argument by counsel was not to be considered as evidence in the case. Based on our review of the case, we conclude that the improper argument did not affect the verdict to the prejudice of the Defendant. Defendant is not entitled to relief on this issue.

CONCLUSION

After a thorough review of the record, we affirm the judgment of the trial court.

THOMAS T. WOODALL, JUDGE